In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1552

BANKERS MORTGAGE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum and order and the findings of facts and conclusions of law of the district court (R. 48–55, 128–131)[1] are unreported. The opinion of the court of appeals (Pet. App. 1a–12a) is reported at 423 F. 2d 73.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1970 (Pet. App. 13a). The petition

[1] "R." references are to the separately bound Appendix to petitioner's brief in the court of appeals. "Pet." and "Pet. App." references are to the petition for certiorari and the Appendix thereto, respectively.

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tioner was not required to repay the loan and could cancel the loan at any time, the transaction was in substance a sale of its mineral interest for $300,000, and was to be treated as such for income tax purposes. The Tax Court upheld the Commissioner's determination in 1943 (1 T.C. 698), and, in 1944, the Fifth Circuit affirmed (141 F. 2d 357, affirmed on rehearing, 142 F. 2d 130), and this Court denied the subsequent petition for certiorari (323 U.S. 727). (Pet. App. 4a.)

Despite the judicial determination, petitioner and Humble continued to treat the 1937 transaction as a loan on their respective books and for other purposes. By 1962, petitioner's obligations under the notes, with the exception of its obligation to pay interest at maturity on the $200,000 note, had been fully discharged through application of the royalties due petitioner under the lease. Petitioner thereupon exercised its option to pay the interest on the $200,000 note ($137,389.29), and Humble released the deed of trust that had secured the notes. (Pet. App. 4a–5a.)

Petitioner deducted its 1962 payment on the $200,000 note as interest. Consistently with the prior judicial determination that the 1937 transaction was a sale and not a loan, the Commissioner treated petitioner as having exercised its option to repurchase the property. Accordingly, he viewed the 1962 payment as the purchase price and disallowed the interest deduction. Petitioner paid the tax in dispute for 1962 and brought this suit for refund in the district court. Petitioner also claimed a refund for 1937, seeking to reopen the 1943–1944 litigation. (Pet. App. 2a, 5a.)

The district court held (R. 128–131) that petitioner was collaterally estopped to assert the 1962 claim by the prior judicial determination. It also held (R. 48–55) that petitioner could not reopen the prior proceeding under Rule 60(b) of the Federal Rules of Civil Procedure and that this claim was barred by *res judicata*. On appeal, the Fifth Circuit affirmed (Pet. App. 1a–12a).

ARGUMENT

The decision below is correct. There is no conflict or any other ground for further review.

1. The courts below properly held that petitioner's claim for 1962 was barred by collateral estoppel. As the court of appeals explained (Pet. App. 10a), the prior litigation and petitioner's 1962 claim involve the identical question—whether the 1937 transaction constituted a loan. Thus, under this Court's decision in *Commissioner* v. *Sunnen*, 333 U.S. 591, 599–600, the prior determination that the 1937 transaction was not a loan bars the new claim unless, in the interim, the controlling facts or applicable legal principles have changed.

There has been no change in the controlling facts. The alleged "new" facts upon which petitioner relies (Pet. 11) are that it has continued to treat the transaction as a loan for non-tax purposes and made a payment in 1962 which it characterizes as interest. Petitioner's treatment of the transaction other than for tax purposes and the label which it chooses to attach to its 1962 payment cannot control the tax consequences here. The essence of the earlier determina-

tion was that, notwithstanding the form of the 1937 transaction, the transaction was in substance a sale. Petitioner's "new" facts would be controlling only if the form, rather than the substance, of the transaction was determinative of the tax consequences.

Nor has there been a change in the applicable law subsequent to the 1943–1944 litigation, which would prevent application of collateral estoppel. Petitioner relies (Pet. 14) on Section 1.163–1(b) of the Treasury Regulations (Appendix, *infra*, pp. 9–10).[2] That Regulation, which was promulgated after 1943, provides that a taxpayer-owner of real property may deduct as interest on indebtedness interest on a mortgage note upon which he is not "directly liable." The Regulation is of no help to petitioner since it assumes that the taxpayer is indebted on a mortgage. The question here, however, is whether petitioner was so indebted, and, on this question, the Regulation is irrelevant. (See Pet. App. 10a–11a.)

Contrary to petitioner's contention (Pet. 10), therefore, the decision below in no way conflicts with *Commissioner* v. *Sunnen, supra*. The court of appeals fully adhered to the principles of *Sunnen* in concluding that petitioner was collaterally estopped to make its 1962 claim.

2. Also in keeping with prior authority is the court of appeals' holding that petitioner's claim for refund of 1937 income taxes is barred by the doctrine of *res*

[2] Petitioner also relies (Pet. 15) on *New McDermott, Inc.* v. *Commissioner*, 44 B.T.A. 1035. *New McDermott* was decided in 1941, however, and thus could not reflect a change in the law subsequent to the 1943–1944 litigation.

judicata. Petitioner contends that the court below erred in refusing to grant relief from the earlier judgment by considering its claim as an "independent action to relieve a party from a judgment" under Rule 60(b) of the Federal Rules of Civil Procedure (Appendix, *infra,* pp. 10–11). This contention is without merit.

The court of appeals correctly held (Pet. App. 8a) that petitioner was not entitled to maintain an independent action because it failed to show that mistake, fraud, or accident prevented it from presenting a meritorious defense in the prior proceeding (cf. *National Surety Co.* v. *State Bank,* 120 Fed. 593 (C.A. 8)), and because there were no other equitable grounds warranting relief.[3]

Petitioner's claim to a new hearing rests on one of the same grounds upon which it relies to avoid collateral estoppel with respect to its 1962 claim—that there was a change in the controlling facts subsequent to the 1943–1944 litigation. Since, as we have shown, there was no such change, petitioner, in effect, seeks to relitigate precisely the same issues that were dealt with in the prior action. This it may not do. See *American Surety Co.* v. *Baldwin,* 287 U.S. 156; *Toledo Co.* v. *Computing Co.,* 261 U.S. 399; 7 Moore's *Federal Practice,* par. 60.37; 3 Barron and Holtzoff, *Federal Practice and Procedure* (Rules ed.), Sec. 1331.

[3] Petitioner incorrectly states (Pet. 17) that the court of appeals limited possible relief under Rule 60(b) to situations involving mistake, fraud, or accident. The court quite clearly took into account other "equitable considerations" (Pet. App. 8a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 163. INTEREST.

(a) *General Rule.*—There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness.

* * * * *

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

SEC. 1.163–1 *Interest deduction in general.*

* * * * *

(b) Interest paid by the taxpayer on a mortgage upon real estate of which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or note secured by such mortgage, may be deducted as interest on his indebtedness. Pursuant to the provisions of section 163(c), any annual or periodic rental payment made by a taxpayer on or after January 1, 1962, under a redeemable ground rent, as defined in section 1055(c) and paragraph (b) of § 1.1055–1, is required to be treated as interest on an indebtedness secured by a mortgage and, accordingly, may be deducted by the taxpayer as interest on his indebtedness. Section 163(c) has no application in respect of any annual or periodic rental payment made prior to January 1, 1962, or pursuant to an arrangement which does not constitute a "redeemable ground rent" as defined in section 1055(c) and paragraph (b) of § 1.1055–1. Accordingly, annual or periodic payments of Pennsylvania ground rents made before, on, or after January 1, 1962, are deductible as interest if the ground rent is redeem-

able. An annual or periodic rental payment under a Maryland redeemable ground rent made prior to January 1, 1962, is deductible in accordance with the rules and regulations applicable at the time such payment was made. Any annual or periodic rental payment under a Maryland redeemable ground rent made by the taxpayer on or after January 1, 1962, is, pursuant to the provisions of Section 163(c), treated as interest on an indebtedness secured by a mortgage and, accordingly, is deductible by the taxpayer as interest on his indebtedness. In any case where the ground rent is irredeemable, any annual or periodic ground rent payment shall be treated as rent and shall be deductible only to the extent that the payment constitutes a proper business expense. Amounts paid in redemption of a ground rent shall not be treated as interest. For treatment of redeemable ground rents and real property held subject to liabilities under redeemable ground rents, see section 1055 and the regulations thereunder.

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Federal Rules of Civil Procedure:

RULE 60. RELIEF FROM JUDGMENT OR ORDER

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(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the

judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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